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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY MARTIN WARE, Defendant and Appellant.	E052725 (Super.Ct.No. FSB802803) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Kyle Niki Shaffer, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following convictions for forcible rape and residential burglary, defendant Johnny Martin Ware was sentenced to 25 years to life for the forcible rape under the one strike law. (Pen. Code, § 667.61, subds (b), (d)(4).) He claims this sentence must be reduced to 15 years to life because, although the jury found he committed the forcible rape during the commission of a burglary, justifying a 15-year-to-life sentence (Pen. Code, § 667.61, subds. (b), (e)(2)), the jury was not asked to determine and did not find he intended to commit the forcible rape when he entered the victim's residence, the finding necessary to justify the 25-year-to-life sentence (Pen. Code, § 667.61, subds. (b), (d)).[1] We agree, and reduce defendant's sentence for forcible rape from 25 to 15 years to life. Defendant raises one other claim of error—that the trial court did not have authority to order him to pay a $79.86 booking fee within 365 days of his release from local custody. (Gov. Code, § 29550.1.) We reject this claim and affirm the judgment in all other respects.

II. FACTS AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

In July 2008, Jane Doe lived in an apartment in San Bernardino with her five- and seven-year-old sons Z. and T. Defendant lived in the same apartment complex and was a

[1] All further statutory references are to the Penal Code unless otherwise indicated.

friend of Doe's cousin. Through her cousin, Doe had known defendant for years, had often spoken with him, and knew him as Marty. Z. and T. also knew defendant. Defendant had been inside Doe's apartment only once or twice. Doe denied ever having a "personal" or sexual relationship with defendant.

On the evening of July 7, 2008, Doe locked the door to her apartment before going to sleep in her bedroom. Z. and T. were also asleep in Doe's bed. Sometime after 1:00 a.m. on July 8, Doe rolled over to retrieve her bed cover and saw a masked man standing in the doorway of her bedroom, holding a gun. Doe was frightened and asked, "What do you want?," and the man replied, "Where's the money at, bitch?" Doe recognized defendant's voice and asked, "Marty?" Z. also recognized the man's voice as defendant's. Defendant pointed his gun at Doe and said, "No, this is Pomona, bitch." Doe told defendant she only had $9.

Z. woke up when he heard the man's voice, began to cry, and ran out of the bedroom, past defendant. Defendant grabbed Z. and told him, "Get back in here, little nigger." Z. returned to the bed with Doe and T., who by this time was also awake. Doe was only wearing a bra, underwear, and pajama shorts. Still pointing the gun at Doe, defendant ordered Doe to undress. Doe replied, "No, my kids."

Defendant then ordered Doe to "[g]et up," and escorted her at gunpoint into her living room while the boys remained in the bedroom. In the living room, Doe saw that her front door was open, and the deadbolt was in pieces on the floor. Doe also saw that her computer was gone.

On the way to the living room, defendant again ordered Doe to take her clothes off, and Doe removed her underwear and pajama shorts. Defendant then slapped Doe, grabbed her arm, forced her toward the couch at gunpoint, and told her to put her face down in the couch. As he pulled his pants down, defendant held his gun at Doe's back. Doe was crying, and clenched her vaginal muscles tightly to prevent defendant from inserting his penis into her vagina. For five to ten minutes, defendant tried to insert his penis into Doe's vagina, and succeeded in penetrating her vagina with the head of his penis. During the rape, defendant continued to hold his gun in one hand.

After the rape, defendant asked Doe, "Well, where's that nine dollars?" He took Doe to her bedroom, where Doe rushed to her purse, retrieved the money, and handed it to defendant. Defendant told Doe not to call the police as he backed out of her bedroom, still pointing his gun at her. On the way out of the bedroom, defendant ransacked Doe's dresser. Doe waited several minutes to make sure defendant was gone, and called her cousin to tell her defendant had robbed and violated her. Doe then called the police and was taken to the hospital.

The police arrived at Doe's apartment at 1:50 a.m. on July 8. The door to the apartment had been kicked in, and the door lock was in pieces on the floor and on the ground outside the apartment. T. appeared "nervous and scared." Doe also appeared scared.

Defendant was arrested later on July 8, and was told he was being charged with residential burglary and rape. At the time of his arrest, he denied seeing Doe or being at

her home on July 7 or 8. He had known Doe for several years but did not mention having any kind of sexual relationship with her.

The parties stipulated that a penile and vaginal swab were taken from defendant and Doe. The female DNA results from defendant's swab included Doe's DNA, and the male DNA results from Doe's swab matched defendant's DNA.

B. *Defense Evidence*

Defendant testified he engaged in consensual sexual intercourse with Doe on July 6 and 7, 2008, and left her apartment early on the morning of July 7. Z. and T. were not in Doe's apartment when defendant was there. Later on July 7, Doe came to defendant's apartment and asked him for money. Defendant told her he did not have any money to give her, but he had given her money in the past. Doe was upset because defendant would not give her money. Defendant admitted having three prior felony convictions.

Defendant's son, nephew, and niece testified they had seen defendant with Doe several times at the apartment complex, either at the pool or while defendant was working on Doe's car. Defendant's nephew once heard Doe ask defendant for cigarettes and money. Defendant's son confirmed that defendant was known as Marty.

C. *The Verdicts, Findings, and Sentence*

The jury found defendant guilty as charged of residential burglary (§ 459; count 1), residential robbery (§ 211; count 2), and forcible rape (§ 261, subd. (a)(2); count 3). Additionally, the jury found that defendant committed the rape during the commission of the burglary (§ 667.61, subds. (b), (e)(2)), and personally used a firearm during the

commission of each crime (§ 12022.53, subd. (b)). Defendant admitted four prison priors (§ 667.5, subd. (b)) and one prior serious felony/prior strike conviction (§ 667, subds. (a)(1), (b)-(i)). He was sentenced to 69 years to life.

Under the one strike law (§ 667.61), the court imposed an indeterminate term of 25 years to life for the forcible rape conviction, doubled to 50 years to life for the prior strike, plus 10 years for the firearm enhancement, five years for the prior serious felony conviction, and four years for the prison priors. Additional terms were imposed but stayed on the burglary conviction, and a 27-year term on the robbery conviction was run concurrent to the term on the forcible rape conviction.

III. DISCUSSION

A. *The 25-year-to-life Term on the Forcible Rape Conviction Must be Reduced to 15 Years to Life Because the Jury Was Not Asked to Determine Whether Defendant Entered Doe's Residence With the Intent to Commit the Forcible Rape (§ 667.61), and the Error Was Prejudicial*

Defendant claims his 25-year-to-life sentence for the forcible rape conviction in count 3 must be reduced to 15 years to life under the one strike law. (§ 667.61.) We agree.

The one strike law (§ 667.61) mandates the imposition of life terms for certain sex offenses committed under certain aggravating circumstances—specifically, 15 years to life or 25 years to life—depending on the particular aggravating circumstance. (*People v. Jones* (1997) 58 Cal.App.4th 693, 703 [Fourth Dist., Div. Two].) A 15-year-to-life term

must be imposed for a forcible rape committed during the commission of a residential burglary. (§ 667.61, subds. (b), (c)(1), (e)(2).) But if the defendant committed a forcible rape during the commission of a residential burglary *and* entered the residence with the intent to commit the forcible rape, then the court is required to impose 25 years to life for the forcible rape. (§ 667.61, subds. (b), (c)(1), (d)(4); *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1274 (*Estrada*).)

The facts required to impose punishment under the one strike law must be alleged in the accusatory pleading and either admitted by the defendant or found true by the trier of fact. (§ 667.61, subd. (j).) The trial court also has a duty to instruct sua sponte on the general principles of law relevant to the issues presented by the evidence. (*People v. Roldan* (2005) 35 Cal.4th 646, 715.) Accordingly, it is an error of state law not to instruct on the findings necessary to impose a 15- or 25-year-to-life term under the one strike law. (*Estrada, supra*, 57 Cal.App.4th at p. 1275.) A defendant also has a Sixth Amendment right to a jury trial on one strike allegations because one strike findings have the potential to increase the defendant's punishment. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Anderson* (2009) 47 Cal.4th 92, 102-103.)

Here the information alleged that defendant forcibly raped Doe during the commission of the burglary *and* committed the burglary—that is, entered Doe's apartment—with the intent to commit the forcible rape. The jury was instructed to determine, and found, that defendant committed the forcible rape during the commission of the burglary. (§ 667.61, subds. (b), (e)(2).) As defendant concedes, this finding

required the court to impose 15 years to life for the forcible rape. (§ 667.61, subds. (b), (e)(2).) But the jury was not instructed to determine, and did not find, that defendant committed the burglary, or entered Doe's apartment, with the intent to commit the forcible rape. (§ 667.61, subds. (b), (d)(4).) The failure to instruct on the 25-year-to-life one strike allegation was error. (*Estrada, supra,* 57 Cal.App.4th at p. 1275.)

As defendant further argues, the failure to instruct on the one strike allegation was prejudicial under both the *Watson* and *Chapman* standards of review.[2]

In *Estrada,* the court concluded that the harmless error standard articulated in *Watson* applies to the failure to instruct on a one strike allegation because the defendant's right to a jury trial on a one strike allegation arises under state law and involves a "'misdirection of the jury.'" (*Estrada, supra,* 57 Cal.App.4th at p. 1276, citing *People v. Wims* (1995) 10 Cal.4th 293, 304, 314 and Cal. Const. art. VI, § 13.) That is, the failure to instruct is harmless "only if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Estrada, supra,* at p. 1276, quoting *Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability does not mean more likely than not; it means "a *reasonable chance,* more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) *Estrada* is outdated on this point because the California Supreme Court has since recognized that a defendant has a federal constitutional right to have a jury determine the

[2] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

truth of one strike allegations. (*People v. Anderson, supra,* 47 Cal.4th at pp. 102-103.) And under *Chapman,* which generally applies to trial errors of federal constitutional dimension, the question is whether the failure to instruct on the one strike allegation was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24; *People v. Flood* (1998) 18 Cal.4th 470, 504.)

Instructions that omit or misdescribe an element of a charged offense violate the defendant's right to a jury trial guaranteed by the federal Constitution, and such errors are harmless only if it can be said beyond a reasonable doubt that the jury's verdict would have been the same absent the error. (*Chapman, supra,* 386 U.S. at p. 24; *Neder v. United States* (1999) 527 U.S. 1, 7-10.) Indeed, "there is 'a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue.' [Citation.] Harmless error analysis . . . '"may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings." [Citation.]'" (*People v. Lewis* (2006) 139 Cal.App.4th 874, 888 [Fourth Dist., Div Two], citing concurring opinion of Justice Stevens in *Neder v. United States, supra,* at p. 26.) Here, the trial court's failure to instruct the jury on the 25-year-to-life one strike finding—that is, to determine whether defendant entered Doe's apartment with the intent to commit forcible rape—is akin or functionally equivalent to a failure to instruct on an element of a charged offense. And here, it cannot be said that the instructional error or omission is harmless beyond a reasonable doubt unless, based on

the entire record, the jury necessarily made the finding adverse to defendant had it been given the opportunity to make the finding.

Here it cannot be said that the failure to instruct on the 25-year-to-life one strike allegation was harmless beyond a reasonable doubt. Had the jury been instructed on the allegation, there is a reasonable possibility it would have found the allegation not true—that is, there is a reasonable possibility it would have found that defendant did not enter Doe's apartment with the intent to forcibly rape her. There is also a reasonable probability—more than an abtract chance—that the jury would have found defendant did not enter Doe's apartment with the intent to forcibly rape her.

The jury was instructed it could find defendant guilty of the burglary if it found he entered the apartment with the intent to commit theft *or* forcible rape, and it did not have to agree on which of the two crimes he intended. And in closing argument, the prosecutor relied on both theft and forcible rape as the intended crimes supporting the burglary charge and did not emphasize that defendant entered the apartment with the intent to forcibly rape Doe. Indeed, the evidence supported a reasonable inference that defendant entered the apartment intending to commit theft, but not forcible rape, and decided to forcibly rape Doe only after he entered her apartment. Defendant apparently took Doe's computer out of her apartment before he woke her and raped her, and the first thing defendant said when Doe awoke and asked defendant what he wanted was, "Where's the money at, bitch?" Then, after defendant raped Doe but before he left her apartment, he took $9 from Doe, the only money she said she had, and ransacked her

dresser. Based on this evidence, the jury could have reasonably concluded that defendant decided to forcibly rape Doe only after he woke her and found her partially clad in a bra and pajama shorts.

Estrada does not assist the People's argument that the failure to instruct on the 25-year-to-life one strike sentencing allegation was harmless under both *Watson* and *Chapman*. Though *Estrada* bears many similarities to the present case, it is distinguishable in critical respects.

The defendant in *Estrada* entered the victim's apartment in the early morning hours. (*Estrada, supra,* 57 Cal.App.4th at p. 1273.) The victim screamed after she saw the defendant standing in her hallway, looking into her bathroom. The defendant ran into the victim's bedroom and raped her after a brief struggle. Afterward, he asked the victim to forgive him and left. The defense was based on alibi and mistaken identity. There was no indication the defendant took any property from the victim or her apartment. (*Ibid*.)

Like the defendant here, the defendant in *Estrada* was convicted of residential burglary and forcible rape, and sentenced to 25 years to life under the one strike law. (*Estrada, supra,* 57 Cal.App.4th at p. 1273.) And like the jury here, the jury in *Estrada* was instructed it could find the defendant guilty of the residential burglary if it found he entered the victim's apartment either with the intent to steal or commit rape. (*Id*. at p. 1275.) But unlike the present case, in which the jury made no finding concerning defendant's intent upon entering Doe's apartment, the jury in *Estrada* found that "the

'forcible rape occurred during the defendant's commission of a residential burglary *with intent to commit rape*.'" (*Id.* at p. 1273, italics added.)

The *Estrada* court concluded that the instructions and verdict form were erroneous because they did not require the jury to determine whether the defendant entered the victim's apartment with the intent to commit forcible rather than "'nonforcible'" rape, or a type of rape not subject to the one strike law. (*Estrada, supra*, 57 Cal.App.4th at pp. 1274-1275.) Still, the court found the errors harmless because there was no reasonable probability the jury would have found that the defendant entered the apartment with the intent to commit "'nonforcible'" rape. (*Id.* at pp. 1275-1277.) In so concluding, the court emphasized that (1) the prosecutor relied solely on the theory that the rape was forcible, and that the defendant entered the victim's apartment with the intent to commit only forcible rape, not theft, (2) the defense offered no alternative theories, (3) the jury was instructed only on forcible rape, and (4) the evidence did not reasonably support a conclusion that the rape was not forcible. (*Ibid.*)

Estrada is thus distinguishable from the present case because it did not involve the complete failure of the jury to make any finding on the pertinent one strike allegation. And here, in contrast to *Estrada*, the prosecutor did not rely solely on the theory that defendant entered Doe's apartment with the intent to commit forcible rape for purposes of the burglary charge, but instead relied on the alternative theories that he entered the apartment with the intent to commit either forcible rape or theft. And here, in contrast to *Estrada*, there was evidence that defendant entered Doe's apartment with the sole

intention of committing theft, and the forcible rape intention upon entry was not stressed to the jury. In *Estrada* there was no indication that the defendant entered the victim's apartment intending to commit theft, but only to commit forcible rape.

Lastly, defendant claims the trial court's failure to instruct the jury on the 25-year-to-life one strike sentencing allegation means his sentence on count 3 must be reduced from 25 to 15 years to life, doubled to 30 years to life based on his prior strike conviction. As defendant concedes, the jury's finding that he committed the forcible rape during the commission of the burglary supports the imposition of a 15-year-to-life term on his forcible rape conviction. (§ 667.61, subds. (b), (e)(2).) The People do not disagree. We modify defendant's sentence accordingly.[3]

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[3] At oral argument, the People argued that the failure to instruct on the 25-year-to-life one strike allegation under section 661.67 subdivisions (a), (c)(1), and (d)(4), as alleged in the information, was harmless beyond a reasonable doubt for a reason not raised in their respondent's brief. Specifically, the People maintain that, by finding defendant guilty of rape (§ 261, subd. (a)(2)) and by finding he personally used a firearm in the commission of the rape (§ 12022.53, subd. (b)), the jury necessarily found that defendant qualified for the 25-year-to-life one strike enhancement under section 667.61, subdivisions (a), (c)(1), (e)(2), and (e)(3), though, as the People concede, this allegation was neither alleged in the information as a basis for imposing the 25-year-to-life strike nor submitted to the jury.

Indeed, as pertinent here, a defendant may be sentenced to 25 years to life under the one strike law if the defendant either (1) committed forcible rape (§ 261, subd. (a)(2)) during the commission of a first degree burglary (§ 460) *with the intent* to commit the forcible rape (§ 667.61, subds. (a), (c)(1), (d)(4)), *or* (2) committed forcible rape *during the commission* of *a* burglary (§ 459) *and* personally used a firearm in the commission of the rape (§§ 12022.53, subd. (b), 667.61, subds. (a), (c)(1), (e)(2), (e)(3)). Nonetheless, defendant has not had an opportunity to respond to the People's newly raised, unbriefed, and alternative harmless error claim. And, as the People concede, the basis for imposing the 25-year-to-life enhancement under section 667.61, subdivision (e)(2) and (e)(3) was neither alleged in the information nor submitted to the jury. Given these circumstances, we decline to address the People's alternative harmless error claim. (*People v. Alice*

[footnote continued on next page]

B. *The Order Directing Defendant to Pay a Booking Fee Within 365 Days of His Release From Local Custody Was Proper*

At sentencing, the court ordered defendant to pay a $79.86 booking fee to the City of San Bernardino "*within 365 days of [his] release from custody* with proof of payment to the parole officer." (Italics added.) (Gov. Code, § 29550.1.) Defendant claims that the part of the order requiring him to pay the booking fee within 365 days of his release from local custody was statutorily unauthorized and must be stricken. We disagree.

The booking fee was imposed under Government Code section 29550.1,[4] which provides, in pertinent part: "A judgment of conviction shall contain an order for payment

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[footnote continued from previous page]
(2007) 41 Cal.4th 668, 674-679 [court may not render decision on basis not briefed by the parties unless parties are given opportunity to present supplement brief on the issue]; Gov. Code, § 68081.)

The People further argue that, in the event the failure to instruct on the 25-year-to-life one strike allegation was not harmless, the appropriate disposition of this appeal is not to reduce defendant's one strike sentence from 25 years to life to 15 years to life, but to remand the matter for further proceedings, including a retrial on the one strike enhancement allegation. In this regard, the People maintain that the double jeopardy clause does not apply to enhancements, but only to substantive crimes. Here, again, the People failed to brief the double jeopardy issue in their respondent's brief, even though defendant articulated in his opening brief that the double jeopardy clause barred a retrial on the one strike enhancement. Given this circumstance, we also decline to address the People's untimely double jeopardy argument.

[4] Sections 29550, 29550.1, and 29550.2 of the Government Code govern the imposition of booking fees or fees for processing arrested persons into county jail by various arresting agencies. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399, fn. 6.) Arrests made by cities are governed by Government Code section 29550.1; arrests made by counties are governed by Government Code section 29550, subdivision (c); and arrests made by "any governmental entity not specified in [Government Code] Section 29550 or 29550.1" are governed by Government Code section 29550.2, subdivision (a). (*People v. Pacheco*, *supra*, at p. 1399, fn. 6.)

of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt."[5]

Unlike restitution fines, criminal justice administration fees, or booking fees as they are more commonly known, are not punitive in nature but are a type of "'user' fee" imposed on a defendant for his or her use of the county jail system. (*People v. Rivera* (1998) 65 Cal.App.4th 705, 710-711.) The Legislature's intent in enacting Government Code section 29550.1 and analogous statutes providing for the payment of booking fees to other governmental agencies (Gov. Code, §§ 29550, 29550.2) was to help arresting agencies offset the costs of providing jail services (see *People v. Rivera, supra,* at p. 710).

Defendant maintains that because an order directing the payment of a booking fee is only enforceable as a judgment in a civil action and cannot be enforced by contempt (Gov. Code, § 29550.1), the trial court was without authority to require him to pay the fee within 365 days of his release, or any other time frame. Instead, he argues, "the trial

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[5] The full text of Government Code section 29550.1 states: "Any city, special district, school district, community college district, college, university, or other local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. *A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt*. The court shall, as a condition of probation, order the convicted person to reimburse the city, special district, school district, community college district, college, university, or other local arresting agency for the criminal justice administration fee." (Italics added.)

court has the authority to enforce its order requiring payment of a booking fee only if the City of San Bernardino chooses to seek enforcement through civil proceedings."

Defendant is only partly correct. Under the express terms of Government Code section 29550.1, the trial court cannot enforce its judgment requiring defendant to pay the booking fee by contempt proceedings, but can enforce the judgment as a civil judgment if the City of San Bernardino chooses to enforce it as such. (Code Civ. Proc., § 695.010 et seq.) But this does not mean the court had no authority to require defendant to pay the booking fee within 365 days of his release from local custody.[6]

Indeed, the court's authority to impose a time frame for payment is implied in the statute's use of the phrase, "[a] judgment of conviction shall contain *an order for payment* of the amount of the criminal justice administration fee . . . ." (Gov. Code, § 29550.1, italics added.) The 365-day time frame for payment is simply part of the "order for payment." (*Ibid*.) If the booking fee is not paid within 365 days following

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[6] The People argue that defendant has forfeited his right to challenge any part of the order directing payment of the booking fee on appeal because he did not object to the order imposing the fee in the trial court. The California Supreme Court is currently reviewing the issue of whether the failure to object to the imposition of a booking fee in the trial court forfeits a claim on appeal that insufficient evidence supports the court's determination that the defendant was able to pay the fee. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Here, defendant does not challenge the sufficiency of the evidence that he had the ability to pay the booking fee. Rather, he claims the court had no authority to require him to pay the fee within 365 days of his release from local custody. Even if defendant has forfeited this claim, we exercise our discretion to address it because it involves a rather straightforward question of statutory construction. (§ 1259; *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [appellate court has discretion to review forfeited claims on appeal so long as they do not involve the admission or exclusion of evidence].)

defendant's release from local custody, then the City of San Bernardino may enforce the order or judgment directing the payment of the fee "in the same manner as a judgment in a civil action." (*Ibid*.)

IV. DISPOSITION

The judgment is modified to reduce defendant's one strike sentence on his forcible rape conviction in count 3 from 25 years to life to 15 years to life, doubled to 30 years to life based on defendant's prior strike conviction. Thus, defendant's indeterminate 69-year-to-life sentence on count 3 is reduced to 49 years to life. The matter is remanded to the trial court with directions to prepare an amended abstract of judgment showing this modification, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.